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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-34

LEWIS M. STRAUSS and
JOSEPH P. BALLIRO,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

DAVID BERMAN
ZAMPARELLI AND WHITE
Counsel for Lewis M. Strauss
JOSEPH J. BALLIRO
Counsel for Joseph P. Balliro

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the First Circuit, affirming prison sentences entered against each petitioner.

Opinion Below

The opinion of the Court of Appeals is not yet reported. Petitioners incorporate by reference the appendices to the petition filed herewith on behalf of Ilario Zannino and Peter

Limone (hereinafter the Zannino petition), with whom petitioners were tried. References in this petition to the opinions will be to the pages in the appendices to the Zannino petition.

Judgment Below

The judgments of the United States District Court for the District of Massachusetts were entered on January 20, 1971.

The judgments of the Court of Appeals for the First Circuit were entered on June 7, 1971 and are annexed hereto as Appendix A.

Jurisdiction

The judgments sought to be reviewed are dated, and were entered, June 7, 1971.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1) and Rule 22(2).

Questions Presented

1. In a prosecution under 18 U.S.C. § 2314 for transporting stolen goods across state lines, was it necessary for the Government to prove that the transporters knew or should have known that they were crossing state lines?

2. Even if it was not necessary for the Government to produce evidence that the transporters knew or should have known that they were crossing state lines, did the Court below err in approving an instruction to the jury in a prosecution for transporting stolen jewelry in interstate commerce under 18 U.S.C. § 2314 stating that the Government need not show that petitioners knew they were crossing a state line?

3. Are petitioners entitled to new trials on the basis of newly discovered evidence that three police officers were interviewing the Government's key witness at a time and place contradictory of a critical part of his testimony?

Statutes Involved

18 U.S.C. § 2314 is set forth in the Zannino Petition at p. 4 and is incorporated herein by reference.

Statement of the Case

There is an accurate statement of both the facts and the proceedings below in the Zannino Petition at pp. 4-7.

We feel constrained to add, however, in view of the statements therein that Messrs. Zannino and Limone did not know that the jewelry was being transported across a state line, that these statements are absolutely applicable to petitioners Strauss and Balliro. What was said about Limone and Zannino might equally be said of Strauss and Balliro: there was "not a smidgen of evidence" that they knew that they had crossed state lines when they allegedly transported the jewelry from New Hampshire to Massachusetts.

Reasons for Granting the Writ

I. The Court Below Erred in Sustaining a Judgment Against Petitioners for Transporting Stolen Goods Across a State Line When the Government Failed to Prove that They Knew, or Should Have Known, that Such Line was Being Crossed.

On this point petitioners can and do adopt most of the arguments advanced in the Zannino Petition at pp. 7-16. Petitioners however, cannot and do not join in so much of

the reasoning as suggests that it is possible to draw meaningful distinctions between accessories and principals for purposes of requiring proof of interstate knowledge. The suggestion that the principal takes extra risks "because his possession of knowingly stolen goods is inherently illicit" dissolves when it is put to the light. In truth, it is as "inherently illicit" to knowingly aid and abet the transportation of stolen goods as it is to transport them. Of course, if *mens rea* were not an essential element of the crime charged in 18 U.S.C. § 2314 and 18 U.S.C. § 2(a), if innocent aiding and abetting were punishable thereunder, the distinction suggested by Zannino and Limone might be tenable. But, in truth, the contrary proposition has long been established. *United States* v. *Spica,* 413 F.2d 129, 131 and cases cited (8th Cir.).

Although it is within the power of Congress to create crimes in which the defendant's knowledge or intent need not be proven as to some or all of the elements, the intention to dispense with this element will not be easily inferred and, in any event, will not ordinarily be inferred from mere silence. *Morrissette* v. *United States,* 342 U.S. 246, 250-266. *Hughes* v. *United States,* 338 F.2d 651, 652 (1st Cir.). We shall not attempt to repeat here the reasons for the rule stated so eloquently and persuasively in *Morrissette, supra,* by Mr. Justice Jackson. These reasons are as applicable to principals as they are to accessories. Indeed, the reasoning of *Morrissette, supra,* was recently applied by the Sixth Circuit to reverse a judgment under 26 U.S.C. § 7212(a) charging the defendant as a principal in impeding revenue officers in the performance of their duties. *United States* v. *Rybicki,* 403 F.2d 599, 602-604. In this case the Court unequivocally held that the defendant was entitled to an instruction that, for the jury to convict the defendant, it must find that he *knew* the persons whom he impeded to

be federal officers. This was true even though the defendant had threatened the agents with a gun.

The present case ought to be *a fortiori*. Impeding a federal agent is *per se* a crime against the United States. Transporting stolen goods only becomes such a crime when a state line is crossed. The concept of a limited Federal Government, we submit, requires that, before one can be convicted in a United States Court for a crime against the United States, there be some showing of *scienter* as to the element upon which federal jurisdiction is based.

II. THE COURT BELOW ERRED IN APPROVING AN INSTRUCTION TO THE JURY THAT PETITIONERS' KNOWLEDGE OF THE INTERSTATE NATURE OF THE TRANSACTION NEED NOT BE PROVEN.

Petitioners asked the judge to charge the jury:

> "If you should find that the defendant merely caused the interstate transportation of the subject jewelry, then you must acquit him unless you also find beyond a reasonable doubt the defendant knew of the interstate character of the alleged transportation."

Over petitioners' objections, the judge refused the instruction and instead charged the jury:

> "If a person transporting stolen property crosses a state line but chances to be unaware of where he is and unaware of the fact that he is crossing a state line, the offense is still committted if the other elements are established by the government by proof beyond a reasonable doubt."

The refusal to charge as requested and the error in charge actually given were argued to the Court of Appeals, which

held that there was no error (fn. 2, A-27) since "the statute makes it clear that the only knowledge required is that stolen goods are being transported." (A-27).

Petitioners Limone and Zannino contend that as accessories they were entitled to directed verdicts because the Government failed to produce any evidence that they knew the jewelry was hidden outside Massachusetts. Petitioners Strauss and Balliro, although principals, join in this contention. If they are successful in that argument, the petitioners are *a fortiori* entitled to prevail on this one. On the other hand, petitioners Strauss and Balliro, as principals cannot rely only on language in cases dealing with accessories. For purpose of this argument, these petitioners assume that, where they allegedly drove Soroko to New Hampshire to get the jewelry, the jury was entitled to infer knowledge as to the interstate nature of the transaction, even in the absence of any evidence of such knowledge.[1] Our point is that the jury was not required to draw this inference[2] and that, if they failed to draw it, the Government failed to prove an essential element of its case, entitling petitioners to acquittal by the jury. *United States* v. *Marchisio*, 344

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[1] In fn. 2 the Court of Appeals states that "there was some evidence from which the jury could infer that Strauss knew he had crossed into New Hampshire." Petitioner Strauss submits that there is no such evidence in the record, although, for purposes of this argument, the existence *vel non* of such evidence is immaterial.

[2] It is by no means clear that the jury would have drawn such an inference had it been left to do so. Soroko testified that the location of the cabin in New Hampshire was such that one could drive from there to Boston in one hour and ten minutes, keeping within the speed limit and notwithstanding the usual Friday afternoon traffic in Boston (Tr. 507, 509-510). If the judge had given the requested instruction (and had charged correctly on interstate knowledge), the jury may well have come to the conclusion that, if Soroko was telling the truth about the trip to New Hampshire, the location of the cabin in New Hampshire was so close to the Massachusetts line that petitioners were unaware of crossing it.

F.2d 653, 662 (2nd Cir.); *Battle* v. *United States*, 345 F.2d 438, 440 (D.C. Cir.).

In holding proof of knowledge of the interstate nature of the transaction to be unnecessary, the Court below failed to come to grips with language in the leading cases decided by this Court under 18 U.S.C. § 2314 and its predecessor.

In *United States* v. *Sheridan*, 329 U.S. 379, 392, it was held that where the defendant cashed in Michigan three forged checks drawn on a Missouri bank, the "jury could properly have inferred ... that the checks were negotiated and caused to be transported with unlawful or fraudulent intent." Obviously, if this Court had not regarded "interstate" knowledge as an element of the crime, it would have been immaterial whether the jury drew any inference as to the transportation.

In *United States* v. *Pereira*, 347 U.S. 1, the question was whether a verdict should have been directed in favor of a defendant who obtained and cashed in Texas, under false pretenses, a check drawn on a California bank. This Court stated at p. 9:

> "When Pereira delivered the check, drawn on an out-of-state bank, to the El Paso bank for collection, he 'caused' it to be transported in interstate commerce. It is common knowledge that such checks must be sent to the drawee bank for collection, and it follows that Pereira intended the El Paso bank to send this check across state lines."

Again it would have been senseless for the Court to have discussed the question of whether the petitioner knew or should have known (presumably sharing in the "common knowledge") that the check would be transported in inter-

state commerce, if such knowledge were not an element of the offense.

It is not to be imagined that these excerpts from *Sheridan* and Pereira were mere surplusage. The attempt by the Court of Appeals to distinguish *Sheridan* and *Pereira*[3] on the grounds that they involved crimes of "'causing' the interstate transportation of stolen checks" is, we sumbit, an exercise in sophistry. To say that interstate knowledge is material to the guilt or innocence of one who, by presenting a forged check drawn on an out-of-state bank, causes that check to travel in interstate commerce but immaterial as to one who physically crosses a state line with such a check[4] is to introduce into the law distinctions grounded in neither logic nor reality. We submit that the decisions of the Court of Appeals is plainly not in accordance with the only two previous decisions of the Court that are in point.

III. It was Error Not to Grant Petitioners' Motion for New Trial.

The petitioners adopt the argument of the Zannino Petition, pp. 16-21. We repeat and stress what is already said therein: that in denying petitioners' motions for new trial the judge made crucial findings as to Soroko's whereabouts on April 7, 1966 between 12 noon and 1:00 P.M. that are not only unsupported by any evidence but are also flatly contradicted by the testimony of Erwin Soroko, whom the judge purported to believe.

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[3] As well, of course, as its own case of *Nicolopoulos* v. *United States*, 332 F.2d 247.

[4] The language of 18 U.S.C. § 2314 does not distinguish between forged securities or stolen jewelry in any way material to this case.

Conclusion

Certiorari should be granted to review and reverse the judgment of the Court of Appeals.

Respectfully submitted,

DAVID BERMAN
ZAMPARELLI AND WHITE
Counsel for Lewis M. Strauss
JOSEPH J. BALLIRO
Counsel for Joseph P. Balliro

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 71-1036

UNITED STATES OF AMERICA,
APPELLEE,

v.

LEWIS M. STRAUSS,
DEFENDANT, APPELLANT.

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs. DiMento and Harrington.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1038

UNITED STATES OF AMERICA,
APPELLEE,

v.

JOSEPH P. BALLIRO,
DEFENDANT, APPELLANT.

JUDGMENT

Entered: June 7, 1971

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, I is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs DiMento and Harrington.]

In the Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-33 and 71-34

ILARIO ZANNINO, PETER LIMONE, LEWIS M. STRAUSS AND JOSEPH P. BALLIRO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Massachusetts, petitioners [1] Strauss and Balliro were convicted of transporting stolen goods in interstate commerce, and petitioners Zannino and Linmone were found guilty as aiders and abettors, in violation of 18 U.S.C. 2314 and 18 U.S.C. 2. They were sentenced as follows: Zannino, seven years' imprisonment and $5000 fine; Limone, seven years' imprisonment (to be served concurrently with a state sentence); Balliro, five years' imprisonment and $5000 fine; Strauss, three years' imprison-

[1] Petitioners Zannino and Limone have filed a joint petition in No. 71-33, and petitioners Strauss and Balliro have done the same in No. 71-34. Essentially identical contentions are made in both petitions. "Pet." and "Pet. App." refer to No. 71-33.

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ment. The court of appeals affirmed in a comprehensive opinion (Pet. App. 24–34).

The evidence showed that on March 24, 1966, Erwin Soroko and Charles Lombardi robbed a Boston, Massachusetts, jewelry firm of about $146,000 in jewelry (R. 8–9, 46–47, 54–59).[2] They drove to a summer cottage in Northwood, New Hampshire, where the jewelry was hidden, and then returned to Boston (R. 10–12, 780, 784).

Soroko asked petitioner Balliro to arrange a sale of the stolen jewelry, and after one unsuccessful attempt, Balliro arranged a meeting for Soroko with petitioners Zannino and Limone. The meeting occurred in Boston at the Intermission Lounge, which Balliro owned, on the afternoon of April 7, 1966. Zannino said he would arrange to have his appraiser (petitioner Strauss) examine the jewelry (R. 25–28).

The next day Soroko, Balliro and Strauss drove to the cottage in New Hampshire, where the parties examined the jewelry and agreed on a price of $60,000. Soroko gave the jewelry to Strauss and the three men returned to Boston (R. 29–36). Later that afternoon, Zannino and Limone met again with Soroko and Balliro at the latter's lounge and made arrangements for the payment (R. 37–40). Soroko subsequently received the $60,000 from Zannino and Limone in two payments (R. 40–45, 803–806, 811–815).

1. Petitioners contend that knowledge that a state line is being crossed is an essential element of the offense of interstate transportation of stolen property

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[2] "R." refers to the record appendix in the court of appeals, a copy of which is being filed with the Clerk.

with respect to both the principal actors (Strauss and Balliro) and the aiders and abettors (Zannino and Limone), and that there was no proof that they had such knowledge.

a. Strauss and Balliro claim that even though they physically transported the stolen jewelry across the state line, there was no proof that they knew they were traveling interstate. The court of appeals correctly pointed out, however, that "the statute [18 U.S.C. 2314] makes clear that the only knowledge required is that stolen goods are being transported," and concluded that actual knowledge of interstate travel was not necessary (Pet. App. 27). See *United States* v. *Kierschke*, 315 F. 2d 315 (C.A. 6); *United States* v. *Tannuzzo*, 174 F. 2d 177, 180 (C.A. 2) certiorari denied, 338 U.S. 815.

b. Zannino and Limone contend that the interstate travel by Strauss and Balliro was not reasonably foreseeable and that therefore they could not be liable as aiders and abettors under 18 U.S.C. 2. As the court of appeals noted (Pet. App. 27–28), the aider and abettor stands in the shoes of the principal actor; Zannino and Limone are responsible for the acts of their agents, Strauss and Balliro, in crossing a state line, since those acts plainly were within the scope of the criminal agency. See *Pereira* v. *United States*, 347 U.S. 1, 11; *Nye & Nissen* v. *United States*, 336 U.S. 613, 620.

Petitioners cite *Rewis* v. *United States*, 401 U.S. 808, for the proposition that the government must prove "reasonable foreseeability" for criminal liability under 18 U.S.C. 2. This argument fails because

there is an important distinction between 18 U.S.C. 2(a), a standard provision on aiders and abettors under which petitioners were found guilty, and 18 U.S.C. 2(b), which prohibits one person from willfully causing another to do an act that would be unlawful if performed by the first person. 18 U.S.C. 2(b) was involved in *Rewis*. As that case went to the jury, all interstate contacts and travel were initiated by the patrons of a small betting establishment. This Court found that interstate travel "by mere customers" did not violate the statute there involved (18 U.S.C. 1952), and held that the proprietors of the establishment, who themselves were not shown to have travelled interstate or used interstate facilities, could not be convicted on the basis that the interstate contacts and travel by their patrons were foreseeable (401 U.S. at 811–813). Although the *Rewis* opinion does not explicitly make the point, the proprietors' criminal liability could not have been based on the aider and abettor provisions of 18 U.S.C. 2(a), under which Zannino and Limone were convicted, since the activity of the principals, the patrons, did not violate federal law; rather the proprietors' liability would have been based only on 18 U.S.C. 2(b), for willfully causing an act to be done (the interstate travel by their patrons) which would be illegal if directly performed by them. We agree with petitioners, as we urged to the Court in *Rewis* (see 401 U.S. at 813), that foreseeability of result is an essential element under Section 2(b). But there is no like requirement under Section 2(a), and there is no suggestion in *Rewis* casting doubt upon traditional

doctrines of liability for those who aid and abet, under which petitioners are guilty.

2. Petitioners claim that their motion for a new trial should have been granted because their newly discovered evidence flatly contradicted that of the key government witness, Soroko. Petitioners Mannino and Limone also contend that they were denied due process of law because two years of their seven year sentences were particularly ascribed by the sentencing judge to their reputations for being involved in organized crime, as reflected in unrebutted testimony before Senate committees. These contentions were fully answered in the opinion of the court of appeals (Pet. App. 28–32), on which we rely here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971